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The Implementation of Directive 2014/24/EU in the UK

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ABSTRACT

This paper provides a critical assessment of the implementation of Directive 2014/24/EU in the UK by the *Public Contracts Regulations 2015*. It explores the implications of the copy out approach followed by the UK Government in order to avoid gold-plating the transposition of the 2014 EU Public Procurement Package, as well as the deficiencies that result from the perspective of constructing a developed regulatory system. The analysis concentrates on selected novelties of Directive 2014/24/EU, as well as in areas where Member States were granted discretion to choose between a set of options or to find their own mechanisms to achieve certain aims specified at EU level. The paper concludes that the transposition in the UK was a missing opportunity to develop a full regulatory architecture for the control of public expenditure by means of procurement.

KEYWORDS

Public procurement, transposition, Directive 2014/24/EU, Public Contracts Regulations 2015, gold-plating, copy-out.

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1. Introduction²

Due to the peculiarities of the UK's constitutional arrangements,³ it is necessary to clarify the scope of our discussion from the outset.⁴ In that regard, it is worth noting that the need to transpose EU law in a manner that respected the powers of the devolved administrations of Scotland, Wales and Northern Ireland led to the transposition of the 2014 Public Procurement Package resulting in two sets of rules: one for England, Wales and Northern Ireland,⁵ and one for Scotland.⁶ This chapter does not cover Scots law.

Regarding the jurisdiction for England, Wales and Northern Ireland, the powers to adopt secondary or subordinate legislation in section 2(2) of the *European Communities Act 1972*⁷ allowed the UK Government to transpose the 2014 EU Public Procurement Package without the need for a full-fledged Parliamentary debate,⁸ and well in advance of the transposition deadline of 18 April 2016. Given that it had succeeded in obtaining all reforms to EU public procurement law that were set out as strategic priorities to influence the process,⁹ the Cabinet Office considered that the “*revised [EU] package represents an excellent overall outcome for the UK, with progress achieved on all of our priority objectives*”.¹⁰ Thus, the UK Government was keen to carry out an early transposition so that the UK could take advantage of the additional flexibilities in the new rules as soon as possible. The

² Please note that this chapter has been finalised after the UK served notice to leave the European Union under Article 50 TEU on 29 March 2017. However, the purpose of this chapter is not to attempt to forecast the evolution of public procurement regulation in the UK post-Brexit, but rather to describe and reflect the process of transposition of the 2014 EU Public Procurement Package in the UK and, in particular, in the jurisdiction of England, Wales and Northern Ireland. Similarly, trying to ascertain whether the plans for the referendum that eventually led to Brexit influenced the regulatory approach for the transposition would also be purely speculative. Thus, this will not be considered in this issue will not be chapter.

³ For a (final) recast of the constitutional arrangements controlling the UK's reception of EU law, see *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

⁴ Along the same lines, and to the same effect, see LRA Butler, “Below Threshold and Annex II B Service Contracts in the United Kingdom: A Common Law Approach”, in D Dragos & R Caranta (eds), *Outside the EU Procurement Directives – Inside the Treaty?* (Copenhagen, DJØF Publishing, 2012) 283-284; and P Telles, “Awarding of Public Contracts in the United Kingdom”, in M Comba & S Treumer (eds), *Award of Contracts in EU Procurements* (Copenhagen, DJØF Publishing, 2013) 251-253.

⁵ The transposition was completed by means of the *Public Contracts Regulations 2015*, as amended by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*; the *Utilities Contracts Regulations 2016*; and the *Concession Contracts Regulations 2016*.

⁶ Scotland has transposed the 2014 EU Public Procurement Package through separate instruments, including the: *Public Contracts (Scotland) Regulations 2015*; *Public Contracts (Scotland) Amendment Regulations 2016*; *Utilities Contracts (Scotland) Regulations 2016*; *Concession Contracts (Scotland) Regulations 2016*; and *Concession Contracts (Scotland) Amendment Regulations 2016*.

⁷ SI 1972 No. 68. For an overview of these powers, see V Miller, “Legislating for Brexit: Statutory Instruments implementing EU law”, House of Commons Library Briefing Paper No. 7867, 16 January 2017, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7867>, last accessed 04.04.2017.

⁸ Indeed, “[t]he vast majority of EU-related SIs (estimated at 90%) are laid subject to the negative procedure. This means they automatically become law without debate unless there is an objection from either House” of Parliament (ie the Commons or the Lords); see Miller (n 7) 7. In the specific case of the *Public Contracts Regulations 2015*, the House of Lords debated a ‘Motion to Regret’ the haste with which the transposition was carried out, but the motion was eventually withdrawn; see HL Deb 25 March 2015, vol 760, cols 1516-1524.

⁹ See Information Note 05/11 of 10 August 2011, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62104/PPN5-11-Influencing-activity-on-modernisation-of-public-procurement-rules.pdf, last accessed 05.04.2017,

¹⁰ See Information Note 05/13 of 25 July 2013, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/225398/PPN_-_outcome_of_negotiations.pdf, last accessed 05.04.2017.

transposition of Directive 2014/24/EU¹¹ by the *Public Contracts Regulations 2015* (PCR2015)¹² came into force on 26 February 2015.

Simply put, the PCR2015 are copy of Directive 2014/24/EU, with minor drafting corrections,¹³ and some reordering of the content of the paragraphs within some provisions. The preparation of the PCR2015 started with a targeted consultation in 2013,¹⁴ which was later complemented by a further public consultation of the draft regulations and a technical note on their drafting.¹⁵ Despite the broad consultation, it was always made clear that “*the government’s policies on “copy-out” of European Directives (where available) and avoidance of “gold-plating”, ... limit the extent to which Cabinet Office can deviate from the wording of the EU directive when casting the national UK implementing regulations*”¹⁶ (for discussion on gold-plating, see 2.1 below). A brief *Explanatory Memorandum* accompanied the PCR2015,¹⁷ which offers some context for the policy choices and main reforms brought about by the PCR2015. However, beyond its brevity and limited discussion of substantive issues, it is not clear that the *Explanatory Memorandum* can offer specific interpretive support for the provisions of the PCR2015, in particular because of the absence of Parliamentary debate.¹⁸

It is worth noting that the PCR2015 had to be amended by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*¹⁹ in order to correct a relatively large number of technical problems with the text of the PCR2015, in particular to ensure compatibility with EU law where changes in drafting had introduced substantive deviations from the EU rules (see 2.2 below).

Completing the transposition of the rest of the 2014 Public Procurement Package took longer, but was also completed on time.²⁰ For simplicity, this chapter only considers the partial transposition of the 2014 EU Public Procurement Package through the PCR2015. Specific issues concerning the transposition of the rules on utilities procurement²¹ and on concession contracts²² are set aside in

¹¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L 94/65.

¹² SI 2015 No. 102. For an article by article comment on its provisions, see A Sanchez-Graells & P Telles, *Commentary to the Public Contracts Regulations 2015* (2016) available at: www.pcr2015.uk, last accessed 04.04.2017. Please note that some of the rules in the PCR2015 do not apply to Northern Ireland and Wales, such as those concerning procurement below EU thresholds. However, given that these are not relevant for the purposes of our discussion, no further distinction in the scope of application of the PCR2015 will be attempted.

¹³ For a critical assessment of this phenomenon, more broadly, see S Anselmi & F Seracini, “The Transposition of EU Directives into British Legislation as Intralingual Translation: A Corpus-Based Analysis of the Rewriting Process” (2015) 2 *Textus* 39-62.

¹⁴ Information Note 05/13 of 25 July 2013, available at <http://www.bit.ly/1fbpKnV>, last accessed 05.04.2017.

¹⁵ The consultation documents and outcomes, including the *Government response to the consultation on UK transposition of new EU Procurement Directives: Public Contracts Regulations 2015*, are available at <https://www.gov.uk/government/consultations/transposing-the-2014-eu-procurement-directives>, last accessed 05.04.2017

¹⁶ Information Note 05/13 (n 14) para [15].

¹⁷ Available at <http://www.legislation.gov.uk/uksi/2015/102/memorandum/contents>, last accessed 05.04.2017.

¹⁸ This limits the possibilities for UK courts to take into account Parliamentary intent as an interpretive rule.

¹⁹ SI 2016 No. 275.

²⁰ Indeed, both the *Utilities Contracts Regulations 2016* (SI 2016 No. 274) and the *Concession Contracts Regulations 2016* (SI 2016 No. 273) came into force on 18 April 2016.

²¹ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC [2014] OJ L 94/243.

²² Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] OJ L 94/1.

order to avoid repetition and unnecessary complication. Suffice it to note here that the UK Government followed the same broad transposition strategy (*ie* copy-out) throughout.²³

It is worth noting that the rules in the PCR2015 are complemented by a set of guidelines and soft law instruments adopted by the Crown Commercial Service (CCS)²⁴—the UK Government’s central purchasing body, which leads on procurement policy on behalf of the UK Government. In the two years following the transposition of Directive 2014/24/EU, the CCS adopted subject-specific guides on a wide range of issues,²⁵ such as: (i) dynamic purchasing systems; (ii) framework agreements; (iii) changes to procedures; (iv) transparency; (v) requirements for publishing on Contracts Finder;²⁶ (vi) public to public procurement; (vii) selection questionnaires; (viii) electronic procurement and communication; (ix) awarding contracts; (x) subcontracting; (xi) amendments to contracts during their term; (xii) social and environmental guidance; (xiii) the new light touch regime for health, social education and certain other service contracts; (xiv) provisions that support market access for small businesses; and (xv) guidance on the standstill period. Contracting authorities and entities covered by the PCR2015 need to consider this guidance in their procurement activities.

It is also worth noting that, differently from other jurisdictions and due to the relatively more limited litigation of procurement cases and the relatively larger number of extrajudicial settlements reached in the UK, case law offers a limited source of interpretative guidance. Therefore, a joint consideration of the PCR2015 and CCS guidance offers the main regulatory framework to assess the transposition of the 2014 Public Procurement Package in the UK.

The remainder of this chapter aims to offer a critical assessment of selected issues concerning the transposition of Directive 2014/24/EU in the UK. Section 2 discusses the approach followed to the prevention of gold-plating in the transposition and the emergence of some questionable aspects in the implementation that resulted from that copy-out approach. Section 3 then concentrates on specific issues related to some of the novelties of Directive 2014/24/EU. Section 4 assesses the way in which the UK implemented optional aspects of Directive 2014/24/EU, and section 5 does the same for the broader goals that Directive 2014/24/EU mandated on Member States. Section 6 concludes.

²³ See R Ashmore & P Henty, “The Utilities Contracts Regulations 2016” (2016) 4 *Public Procurement Law Review* NA132-NA137; and R Ashmore, “The Concessions Contracts Regulations 2016” (2016) 4 *Public Procurement Law Review* NA138-NA143.

²⁴ The Crown Commercial Service is an executive agency, sponsored by the Cabinet Office, and is responsible for leading on procurement policy on behalf of the UK Government. For further details, see <https://www.gov.uk/government/organisations/crown-commercial-service>, last accessed 05.04.2017.

²⁵ All guidance is available at <https://www.gov.uk/guidance/transposing-eu-procurement-directives>, last accessed 05.04.2017.

²⁶ Contracts Finder is the online portal of procurement opportunities for England, and it can be accessed at <https://www.contractsfinder.service.gov.uk/Search>. Scotland, Wales and Northern Ireland have their own dedicated public sector procurement websites. These are: Public Contracts Scotland for opportunities with public sector bodies in Scotland (http://www.publiccontractsscotland.gov.uk/search/search_mainpage.aspx); Sell2Wales for opportunities with public sector bodies in Wales (<https://www.sell2wales.gov.wales/>); and eSourcing NI for opportunities with public sector bodies in Northern Ireland (<https://e-sourcingni.bravosolution.co.uk/web/login.shtml>). All websites last accessed 05.04.2017.

2. Gold-plating and questionable implementation

2.1. Gold-plating

The issue of “gold-plating” the transposition of EU law has been a mainstream political worry in the UK for over 15 years.²⁷ In this context, and in line with what is perceived to represent the position of the European Commission, gold-plating is understood as “*exceeding the requirements of EU legislation when transposing Directives into national law*”.²⁸ This is not too different from the way in which this concern was reflected in a 2007 European Parliament study, according to which: “*Gold plating techniques consist of adding national provisions to the [EU] text, using more detailed or more restrictive regulations than prescribed by the directive itself. This seems to have often been the case in the United Kingdom ...*”.²⁹ There is no generally accepted definition of gold-plating, but one that is commonly referred to considers that it can take place by

- extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or
- not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
- retaining pre-existing UK standards where they are higher than those required by the directive; or
- providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with [the principles of good regulation] (e.g. as a result of picking up the existing criminal sanctions in that area); or
- implementing early, before the date given in the directive.³⁰

Gold-plating has been increasingly considered as a source of unnecessary red tape for UK businesses, and eventually led to high-level political compromises to put an end to the perceived gold-plating. In that regard, in December 2010, the Coalition Government pledged to comply with a set of measures aimed at ensuring proper but minimal transposition, which were built around the principle of copying out the text of European directives directly into UK law (ie the direct ‘copy-out’ approach).³¹ Subsequent Conservative Governments have kept this approach, which has become an integral part of the Civil Service’s activities in relation to EU law.³²

Based on this general principle of avoiding gold-plating by means of copy-out,³³ the UK’s approach to the transposition of EU law was further fleshed out by means of a 2011 version of *Guiding*

²⁷ For background discussion, see S Weatherill, “Harmonisation: How Much, How Little?” (2005) 16(3) *European Business Law Review*, 533, 538 and ff. See also DG Dimitrakopoulos, “The Transposition of EU Law: ‘Post-Decisional Politics’ and Institutional Autonomy” (2001) 7(4) *European Law Journal* 442 -458.

²⁸ See V Miller, “EU Legislation: Government action on ‘gold-plating’”, House of Commons Library SN/IA/5943, 19 April 2011, available at <http://researchbriefings.files.parliament.uk/documents/SN05943/SN05943.pdf>, last accessed 05.04.2017.

²⁹ European Parliament, *Comparative Study on the Transposition of EC Law in the Member States*, PE 378.294, June 2007, 22, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/378294/IPOL-JURI_ET\(2007\)378294_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/378294/IPOL-JURI_ET(2007)378294_EN.pdf), last accessed 05.04.2017.

³⁰ Miller (n 28) 2.

³¹ Department for Business, Innovation & Skills, “Government ends ‘gold-plating’ of European Regulations”, 15 December 2010, available at <https://www.gov.uk/government/news/government-ends-gold-plating-of-european-regulations>, last accessed 05.04.2017.

³² See M Stanley, “Compliance, Transposition and Gold-Plating”, *The UK Civil Service. Facts, Analysis and Comment*, available at http://www.civilservant.org.uk/policy-making-compliance_transposition_gold-plating.html, last accessed 05.04.2017.

³³ For discussion, see D Greenberg, “The ‘Copy-Out’ Debate in the Implementation of European Union Law in the United Kingdom” (2012) 6(2) *Legisprudence* 243-256. For a critical assessment of this approach from the perspective of regulatory technique, see LE Ramsey “The Copy Out Technique: More of a ‘Cop Out’ than a

Principles for EU Legislation (revised in 2013, see below), and the outcome of the 2011-2012 *Gold-Plating Review*.³⁴ Interestingly, the review found that the copy-out approach had been used in 72% of the instruments that transposed EU law into UK law in the relevant period, and that the cases where Government Departments had followed a different transposition approach were those where (i) “the amendment was being made to an existing UK regulatory regime, with which businesses were already familiar”, (ii) “the EU Directive did not provide sufficient clarity or where implementation needed to provide legal certainty”, or (iii) it was necessary “to specify and clarify how derogations could be exploited by relevant business sectors in order to reduce burdens on business”.

In 2013, the UK Government published updated guidance on the transposition and effective implementation of EU Directives in an effort to avoid “gold-plating” EU law when transposed into UK law.³⁵ Those *Guiding Principles for EU Legislation*³⁶ indicated that, when transposing EU law, the UK Government would:

- a. ensure that (save in exceptional circumstances) the UK does not go beyond the minimum requirements of the measure which is being transposed;
- b. wherever possible, seek to implement EU policy and legal obligations through the use of alternatives to regulation;
- c. endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts;
- d. **always use copy out for transposition where it is available, except where doing so would adversely affect UK interests** e.g. by putting UK businesses at a competitive disadvantage compared with their European counterparts. If departments do not use copy out, they will need to explain to the RRC [Reducing Regulation Sub-Committee] the reasons for their choice;
- e. ensure the necessary implementing measures come into force on (rather than before) the transposition deadline specified in a directive, unless there are compelling reasons for earlier implementation; and
- f. include a statutory duty for Ministerial review every five years.³⁷

In its more detailed *Transposition Guidance: How to implement European Directives effectively*,³⁸ also from 2013, the UK Government returned to the issue of gold-plating and indicated that the guiding principle behind its avoidance is to “endeavour to ensure that UK businesses are not put at a competitive disadvantage compared with their European counterparts”. In more detail, the document also indicated that

Government policy is that you should not to go beyond the minimum requirements of European Directives, unless there are exceptional circumstances, justified by a cost-benefit analysis and

Solution?” (1996) 17(3) *Statute Law Review* 218-228; and H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Oxford, Hart, 2014) 169.

³⁴ Department for Business, Innovation & Skills, *Gold-Plate Review. The Operation of the Transposition Principles in the Government’s Guiding Principles for EU Legislation*, March 2013, available at http://mbsportal.bl.uk/secure/subjareas/mgmt/bis/14583013_683_gold_plating.pdf, last accessed 05.04.2017.

³⁵ See V Miller, “Making EU law into UK law”, House of Commons Library SN/IA/7002, 22 October 2014, available at <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07002>, last accessed 05.04.2017.

³⁶ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78800/Guiding_Principles_for_EU_legislation.pdf, last accessed 05.04.2017.

³⁷ Emphasis added.

³⁸ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229763/bis-13-775-transposition-guidance-how-to-implement-european-directives-effectively-revised.pdf, last accessed 05.04.2017.

consultation with stakeholders. Any gold-plating ... must be explained in your impact assessment and will need to be cleared by the Reducing Regulation Committee.

The impact assessment accompanying the legislation should be explicit about identifying any gold-plating that is being proposed.³⁹

Therefore, given these developments and the fact that the copy-out approach had already informed the UK's transposition of the previous generation EU public procurement directives,⁴⁰ it should come as no surprise that compliance with the copy-out approach was at the forefront of the UK Government's transposition of the 2014 Public Procurement Package.⁴¹ The PCR2015 *Explanatory Memorandum* clearly expressed that

The Cabinet Office's general approach ... **has been to use the 'copy-out' technique**, where available. So far as was considered practical, the text of these provisions has been conformed to UK standards of legislative structure and drafting. But, on the whole, **the Regulations retain the key operative phrases which the Directive uses to express the obligations which are to be imposed on contracting authorities**. Where it was absolutely clear what a clumsily worded passage in the Directive was intended to mean, and would be held to mean, the Cabinet Office has rephrased the corresponding passage in the Regulations with greater precision or in a way that would be more readily understood by readers of UK legislation. By contrast, where there was considered to be genuine ambiguity in the Directive, this has usually been reproduced in the Regulations.⁴²

This copy-out approach not only informed the general transposition strategy, but also a number of specific policy choices that Directive 2014/24/EU had left to Member States' discretion. In particular, the *Explanatory Memorandum* indicated that

Policy choices, ie where the directive permits one or more options, should be made in line with **the Government's proposed approach of rule-simplification and ensuring flexibility for procurers, not impose new burdens on practitioners or "gold-plate" the directive without sufficient evidence to necessitate it**. This includes choosing not to ban the possibility for contract award criteria to be based on lowest price; not imposing new obligations on sub-contractors; and ensuring that all authorities and all suppliers, (including those have yet to fully use e-communications), have adequate time to prepare for the transition to mandatory electronic communications.⁴³

2.2. Questionable transposition

As mentioned above (1), shortly after the adoption of the PCR2015, it was necessary to correct some of its content in order to ensure compatibility with EU law—or, in other words, to correct some instances of incorrect transposition. This was the case, for example, of reg.72 PCR2015 on modification of contracts during their term, which transposed Art 72 of Directive 2014/24/EU. The discrepancy was that the PCR2015 regulated as alternative what the directive had set as cumulative conditions for the modification of contracts due to technical or economic issues, and particularly concerning

³⁹ *Transposition Guidance* (n 38) paras [2.10] & [2.11].

⁴⁰ S Arrowsmith, "Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance" (2006) 3 *Public Procurement Law Review* 86-136.

⁴¹ For interesting insights into this transposition technique and the idiosyncrasies of the reception of EU public procurement law in the UK, see LRA Butler, "Exclusion, Qualification and Selection in the UK under the Public Contracts Regulations 2015", in M Burgi, M Trybus & S Treumer (eds), *Qualification, Selection and Exclusion in EU Procurement* (Copenhagen, DJØF Publishing, 2016) 189-190. See also P Henty, "Implementation of the EU Public Procurement Directives in the UK: the Public Contracts Regulations 2015" (2015) 3 *Public Procurement Law Review* NA74-NA80.

⁴² *Explanatory Memorandum* (n 17) para [3.1], emphasis added.

⁴³ *Explanatory Memorandum* (n 17) para [8.2.5.4], emphasis added.

interchangeability and interoperability requirements.⁴⁴ This was corrected by a modification of reg.72 PCR2015 that clarified that both requirements are cumulative.

It was also the case of reg.57(11) PCR2015 on the duration of exclusion of economic operators, which opted to apply the maximum of 5 years of exclusion to economic operators in breach of their obligations to pay taxes or social security contributions as established by a judicial or administrative decision having final and binding effect [reg.57(3)]. This deviated from Art 57 of Directive 2014/24/EU, which determines that these grounds for exclusion “*shall no longer apply when the economic operator has fulfilled its obligations by paying or entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines*” [which is also established in reg.57(5) PCR2015]. The discrepancy was later corrected in order to align the UK rules to the EU standard.

In addition to these issues—which have been largely corrected in the 2016 reform of the PCR2015—in my view, the main problem with following such a strict copy-out approach in the transposition of the 2014 Public Procurement Package is that, despite its increasing prescriptiveness, it must be acknowledged that it does not create a complete regulatory system for the award of public contracts. In order to make the provisions of the Directives fully operational, it is necessary to insert it into a broader framework of domestic public law or, at the very least, to develop some of its bare bone provisions. By sticking to the letter of the 2014 Directive so closely, the transposition in the PCR2015 has resulted in clear deficiencies in UK public procurement law—some of which, in my opinion, are instances of insufficient or incorrect transposition.

Even if there are other examples—such as the insufficient development of the rules of reg.73 PCR2015 on termination of contracts during their term⁴⁵—in my view, the clearest instance defective transposition is that of reg.76 PCR2015 concerning the principles for the award of contracts for social and other specific services, which transposes Art 76 of Directive 2014/24/EU.⁴⁶

One of the initial difficulties in assessing the appropriateness of the transposition of Art 76 Dir 2014/24 by means of reg.76 PCR2015 derives from the opening clause of the EU provision, whereby “*Member States **shall put in place** national rules for the award of contracts*” for social and other specific services (emphasis added). In a literal reading, this may be seen as requiring the creation of a general (national) procedural framework for the award of these contracts or, in other words, a set of common, generally applicable rules. If that was the proper interpretation, then reg.76(1) PCR2015 may have failed to properly create those “*national rules for the award of contracts*” by determining that “[c]ontracting authorities shall determine the procedures that are to be applied in connection with the award of contracts” or social and other specific services.

By granting contracting authorities (almost) unfettered discretion to determine the applicable procedures—whether they correspond (with or without variations) to procedures, techniques or other features provided for in other parts of the PCR2015, or not—reg.76(1) PCR2015 may have failed to set any sort of specific “*national rules for the award of contracts*”. However, such a literal reading

⁴⁴ A Sanchez-Graells, “Modification of Contracts During their Term under Reg. 72 Public Contracts Regulations 2015”, *How to Crack a Nut*, 19 June 2015, <http://www.howtocrackanut.com/blog/2015/06/modification-of-contracts-during-their.html>, last accessed 05.04.2017.

⁴⁵ A Sanchez-Graells, “Termination of Contracts under Reg. 73 Public Contracts Regulations 2015”, *How to Crack a Nut*, 22 June 2015, <http://www.howtocrackanut.com/blog/2015/06/termination-of-contracts-under-reg-73.html>, last accessed 05.04.2017.

⁴⁶ The full text of this provision, including a consolidation of any legislative reforms, can be found at <http://pcr2015.uk/regulations/regulation-76-principles-of-awarding-contracts/>, last accessed 05.04.2017.

of the requirement in Art 76(1) *ab initio* Dir 2014/24 may be opposed on the basis of the principles of procedural autonomy and subsidiarity, so this may not carry as much weight as one may initially have thought. In any case, it is also possible to read national as domestic, in which case this discussion would be moot.

Be it as it may, however, looking at the details of the very light touch approach adopted by reg.76 PCR2015, the defects seems even more apparent. Reg.76(3) PCR2015 sets out bare minimum requirements for procedures initiated by one of the notices mentioned in reg.75 PCR2015, whereby the contracting authority shall conduct the procurement, and award any resulting contract, in conformity with the information contained in the notice about conditions for participation, time limits for contacting the contracting authority, and the award procedure to be applied. Reg.76(6) PCR2015 adds that all time limits imposed on economic operators, whether for responding to a contract notice or taking any other steps in the relevant procedure, shall be reasonable and proportionate. Taken together, this barely creates any specific rule other than implicitly following the case law preventing substantial modifications of tender procedures without cancellation and re-advertisement.

The big problem comes, in my view, with reg.76(4) PCR2015 whereby contracting authorities may, however, deviate from the content of the previous notice and conduct the procurement, and award any resulting contract, in a way which is not in conformity with that information. It is true that reg.76(4) PCR2015 imposes a relatively stringent set of conditions, so that disregard for the (procedural) information disclosed in the previous notice can take place only if all the following conditions are met: (a) the failure to conform does not, in the particular circumstances, amount to a breach of the principles of transparency and equal treatment of economic operators; and (b) the contracting authority has, before proceeding to deviate from the published information, (i) given due consideration to the matter, (ii) concluded that there is no breach of the principles of transparency and equal treatment, (iii) documented that conclusion and the reasons for it in accordance with regs.84(7) and (8) PCR2015, and (iv) informed the participants of the respects in which the contracting authority intends to proceed in a way which is not in conformity with the information contained in the notice. For these purposes, “participants” means any economic operators which have responded to the notice and have not been informed by the contracting authority that they are no longer under consideration for the award of a contract within the scope of the procurement concerned [reg.76(5) PCR2015].

In my view, there are two main difficulties. First, it adopts a very narrow interpretation of the principle of equal treatment that falls into a *participation trap* that will result in de facto discrimination and an unavoidable infringement of the principle of transparency. Second, this is very likely to trigger infringements on the rules applicable to cancellation and retendering of public tenders.

As to the *participation trap* or ‘trap of tender-specific reasoning’, by designing a system that allows contracting authorities to (1) disclose information that preselects a subset of potential suppliers and (2) later on, alter the rules of the procedure in a way that potential suppliers not included in that subset cannot challenge (because they are not informed and, seemingly, there is no further transparency/publication requirement), reg.76(4) PCR2015 fails to ensure actual compliance with the principle of non-discrimination.⁴⁷

As to the infringement of the requirements for cancellation and retendering of procedures that would otherwise be substantially amended, it seems clear to me that the case law applicable to

⁴⁷ By analogy, see the reasoning of the General Court regarding the need for clarity of tender specifications in its Judgment of 17 February 2011 in *Commission v Cyprus*, C-251/09, EU:C:2011:84 35-51 (not in English).

changes of disclosed contractual conditions applies (if nothing else, by analogy). In that regard, the ECJ has been clear that “*where the amended condition, had it been part of the initial award procedure, would have allowed tenders submitted in the procedure with a prior call for competition to be considered suitable or would have allowed tenderers other than those who participated in the initial procedure to submit a tender*”⁴⁸ are to be deemed substantial modifications of the tender conditions and, consequently, not acceptable. Thus, unless contracting authorities could clearly prove that no other tenderers would have participated had the modified (procedural) conditions been disclosed from the beginning, reliance on reg.76(4) PCR2015 is bound to trigger an infringement of EU law.

For all of the above, I consider reg.76 PCR2015 a very clear instance of defective (if not outright improper) transposition of the requirements in Art 76 Dir 2014/24. It also seems to me to evidence the defects that can result in taking the copy-out approach too far, as it can actually create additional burdens for contracting authorities that will need to design their own procedure (and bear the ensuing legal risks) rather than being allowed to rely on a set of default procedural rules. Consequently, I think that it should be substituted by a sensible, fully-developed set of procedural rules applicable to the award of contracts for social and other specific services.

3. Selected issues of implementation

This section concentrates on the transposition in the UK of some of the rules of Directive 2014/24/EU that create a significant departure or innovation as compared to the 2004 rules. In particular, these concern the revised rules on the exclusion of economic operators (3.1), the competitive procedure with negotiation (3.2), and the modification of contracts during their term (3.3). Other important novelties of Directive 2014/24/EU will be assessed later, depending on whether they were presented as optional rules (4) or broader goals to be attained by the Member States (5).

3.1. Exclusion

As can be inferred from the general copy-out approach to the transposition of Directive 2014/24/EU (above 2), the rules on exclusion of economic operators of Art 57 have been transposed without introducing seemingly significant changes in reg.57 PCR2015⁴⁹—eg by keeping the maximum length of exclusion on the basis of mandatory and discretionary grounds to 5 and 3 years respectively.⁵⁰

However, some aspects of reg.57 PCR2015 trigger some questions of interpretation and application, as well as of compatibility with EU law. The discrepancy I find most striking is that, in all instances where Art 57 of Directive 2014/24/EU refers to ‘conviction by final judgment’, reg.57 PCR2015 simply refers to ‘conviction’⁵¹—with the only exception of exclusion on the basis of breaches of the obligation to pay taxes or social contributions, where reg.57(3)(b) retains the requirement for the breach to be ‘established by a judicial or administrative decision having final and binding effect’. The reason for the substitution of ‘conviction by final judgment’ with mere ‘conviction’ in most instances is not clear from the *Explanatory Memorandum* and it seems hard to understand why would the UK

⁴⁸ Judgment of 4 June 2009 in *Commission v Greece*, C-250/07, EU:C:2009:338, para [52]. By analogy, see also Judgment of 19 June 2008 in *pressetext Nachrichtenagentur*, C-454/06, EU:C:2008:351, para [35].

⁴⁹ For extended discussion, see Butler (n 41) *in totum*. See also A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 57)*, available at <http://pcr2015.uk/regulations/regulation-57-exclusion-grounds/>, last accessed 06.04.2017.

⁵⁰ Nonetheless, note that the initial transposition had applied the maximum exclusion period of 5 years to exclusion based on lack of payment of taxes or social security contributions, which was corrected by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016*; Butler (n 41) 194-195 and above (2.2).

⁵¹ This concerns the transposition of Art 57(1) by reg.57(1), that of Art 57(1) *in fine* by reg.57(2), that of Art 57(7) by reg.57(11) and to the omission of the transposition of Art 57(6) *in fine*.

Government have wanted to create a possibility to ‘anticipate’ debarment in cases of not final (and thus unsafe) convictions. In any case, in my view, a *consistent interpretation* of reg.57 PCR2015 with Art 57 of Directive 2014/24/EU requires convictions to be by final judgment regardless of the specific wording of the UK transposition. Similarly, it is not clear why reg.57 PCR2015 does not transpose Art 57(6) *in fine* and thus omits the explicit rule that an economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility to self-clean during the period of exclusion resulting from that judgment in the Member States where the judgment is effective. This provision has direct effect. Consequently, contracting authorities must apply it, regardless of the fact that reg.57 PCR2015 does not include such a rule.⁵²

The mandatory grounds for exclusion were transposed in reg.57(1) PCR2015 by reference to the domestic criminal law statutes that correlate with the EU instruments listed in Art 57(1) of Directive 2014/24/EU. However, in order to ensure consistency with EU law and avoid the need to reform the PCR2015 if there were changes in those EU instruments, a closing clause was inserted with the purpose of ensuring that contracting authorities are obliged to exclude economic operator that have been convicted of “*any other offence within the meaning of Article 57(1) of the Public Contracts Directive—(i) as defined by the law of any jurisdiction outside England and Wales and Northern Ireland; or (ii) created, after the day on which these Regulations were made, in the law of England and Wales or Northern Ireland*”. This may create uncertainty as to the specific mandatory exclusion grounds applicable at any given point in time, which CCS tries to reduce by publishing a detailed list of mandatory exclusion grounds.⁵³ Still regarding mandatory exclusion grounds, it is worth noting that the UK has taken advantage of the possibility to create a public interest exception as foreseen in Art 57(3) of Directive 2014/24/EU. Indeed, reg. 57(6) and (7) gives discretion to contracting authorities, who *may disregard* the concurrence of (i) mandatory exclusion grounds, including lack of payment of taxes or social contributions established by final and binding decision, “on an exceptional basis, for overriding reasons relating to the public interest such as public health or protection of the environment”, or (ii) mandatory exclusion on the basis of lack of payment of taxes or social contributions established by final and binding decision where only minor amounts of taxes or social security contributions are unpaid or there was no time to fulfil its obligations before the expiry of the relevant deadline. It is remarkable that reg.57(6) and (7) do not specify the conditions in Directive 2014/24/EU and, consequently, important concepts such as the specific circumstances that can justify a public interest, or the unpaid amounts that are considered ‘minor’, remain unclear.⁵⁴

The discretionary exclusion grounds of Art 57(4) of Directive 2014/24/EU are transposed in reg.57(8) PCR2015 without modification. It is noteworthy that the UK has not made any of these grounds mandatory for contracting authorities, who retain full discretion to exclude or not economic operators affected by these grounds. From that perspective, it may seem surprising that the UK decided not to transpose the last paragraph of Art 57(4) of Directive 2014/24/EU, whereby Member States may require or provide for the possibility that the contracting authority does not to exclude an economic operator affected by a bankruptcy-related exclusion ground of Art 57(4)(b) if it is established that the economic operator will be able to perform the contract. However, given that exclusion on the basis of bankruptcy-related grounds is fully discretionary for UK contracting authorities, it seems to

⁵² Sanchez-Graells & Telles (n 49).

⁵³ The current list of mandatory and discretionary exclusion grounds can be found at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551130/List_of_Mandatory_and_Discretionary_Exclusions.pdf, last accessed 06.04.2017.

⁵⁴ See A Sanchez-Graells, “Exclusion, Qualitative Selection and Short-listing”, in F Lichère, R Caranta & S Treumer (eds), *Modernising Public Procurement. The New Directive* (Copenhagen, DJØF, 2014) 97, 107.

me that this possibility is open to them despite the lack of transposition of Art 57(4) *in fine*. Concerning the degree of discretion given to contracting authorities, and consistently with the way in which Art 57(4) is transposed, it is also worth stressing that the UK has not imposed any obligations under Art 57(5) second paragraph (see reg.57(10) PCR2015).

Finally, concerning self-cleaning, reg.57(13) to (17) PCR2015 transpose Art 57(6) of Directive 2014/24/EU word for word, with the only exception of the last paragraph (as discussed above). In that regard, the rules on self-cleaning may create some practical difficulties due to eg the lack of precision of the types of technical, organisation and personnel measures that can be taken for the assessment of sufficiency that contracting authorities need to undertake (see reg.57(15)(c) PCR2015). In order to provide some additional detail, CCS has issued additional guidance where it indicates that the actions agreed on deferred prosecution agreements (DPAs)⁵⁵ may be submitted as evidence of self-cleaning and evaluated by the contracting authority.⁵⁶ The same guidance clarifies that if “such evidence is considered by the contracting authority (whose decision will be final) as sufficient, the potential supplier shall be allowed to continue in the procurement process”. However, it is not clear what the guidance means when it indicates that the decision will be final. In my view, such decisions are open to challenge both by the interested economic operator (if they are negative) and, possibly, by other tenderers or bidders (if they are positive). This would be in line with the need to provide for effective remedies,⁵⁷ and raises important questions about the *actual* finality of the contracting authority’s assessment of the evidence on self-cleaning submitted by economic operators.

3.2. Competitive procedure with negotiation

Reg.29 PCR2015 establishes rules for the conduct of competitive procedures with negotiation and transposes the very similar requirements of Art 29 of Directive 2014/24/EU. It does so however by lengthening and complicating its drafting by including unnecessary repetition of time limit-related rules in paragraphs (6) to (10), which could have been minimised by a cross-reference to reg.28 PCR2015. One of the main changes in the new rules is that a lax interpretation of the grounds that justify the use of this procedure⁵⁸ may transform it into the default procedure or, in the case of the UK, consolidate its widespread use. Hence, the specific rules that are set out in reg.29 PCR2015 regarding the conduct of negotiations are bound to have a very significant practical impact.

The general design of the procedure is on the one hand close to the competitive dialogue, and on the other hand a variation of the restricted procedure that allows for two main adjustments: (1) the negotiated procedure does not necessarily have to be two-stage, but it can be multi-stage (reg.29(19) PCR2015); and (2) the object of the procurement does not need to be completely defined from the time the negotiations start, but can evolve provided some minimum requirements are not subject to negotiation (reg.29(14) PCR2015). As for the second point, the contracting authority needs

⁵⁵ For details, see Serious Fraud Office, *Guidance on Deferred Prosecution Agreements*, available at <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>, last accessed 06.04.2017. See also Butler (n 41) 215-217.

⁵⁶ CCS, *Procurement Policy Note: Standard Selection Questionnaire (SQ)*, Action Note No 8/16, 9 September 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558520/PPN_8_16_Standar_dSQ_Template_v3.pdf, last accessed 06.04.2017.

⁵⁷ By analogy, see Judgment of 5 April 2017 in *Marina del Mediterráneo and Others*, C-391/15, EU:C:2017:268. See also A Sanchez-Graells, “‘If it Ain’t Broke, Don’t Fix It’? EU Requirements of Administrative Oversight and Judicial Protection for Public Contracts”, in S Torricelli & F Folliot Lalliot (eds), *Administrative Oversight and Judicial Protection for Public Contracts* (Larcier, 2017) forthcoming.

⁵⁸ These are set out in reg.26 PCR2015 in the same terms of Art 26 of Directive 2014/24/EU; see A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 26)*, available at <http://pcr2015.uk/regulations/regulation-26-choice-of-procedures/>, last accessed 06.04.2017.

to provide sufficiently precise information at the start so that economic operators can make an informed decision whether to participate. This appears to impose a stricter information requirement than that of a competitive dialogue, but less strict than the restricted procedure.

These possibilities of carrying out a multi-stage procedure where requirements can evolve (provided a minimum remains unchanged) will, in my view, be the two main reasons that can justify resorting to a competitive procedure with negotiation instead of a restricted procedure, given that these are the areas where increased flexibility can provide advantages to the contracting authority. However, the significant flexibility given in the UK for the use rough documents at the first stage and detailed requirements at the second stage of a restricted procedure somehow close this gap as reason (2) is concerned.⁵⁹

In its configuration in Reg.29 PCR2015, contracting authorities need to be mindful of two main risks created by the rules applicable to competitive procedures with negotiation. The first risk is strictly legal and derives from the strange particularisation of the principle of equal treatment in reg.18 PCR2015 in connection with reg.29(13) PCR2015, which requires contracting authorities to *“negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve their content.”* The immediate question is whether they have to negotiate with all tenderers and whether they have to do it simultaneously (if at all possible) and with the same intensity. More negotiations mean as well a risk for unequal treatment. The best way out of this situation will be for contracting authorities to disclose more specific rules, such as establishing sequential negotiations whereby they engage with negotiations with one tenderer (eg the one with the highest score for the initial offer) and, failing an agreement within a set deadline, they move on to the next, and so on and so forth—this may be difficult to square with a strictly literal interpretation of reg.29(19) PCR2015 on staging the negotiations,⁶⁰ but it seems like the most functional interpretation. Otherwise, they are exposing themselves to significant litigation risks.

The second risk is of a strategic nature. reg.29(15) PCR2015 allows contracting authorities to award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so. This does not seem to restrict the options of the contracting authority to the moment prior to engaging in negotiations. That is, a literal interpretation supports that contracting authorities, at any point prior to concluding the negotiations (reg.29(21) PCR2015) can decide to go back to the original tender and award the contract. This is a risky strategy, particularly if the negotiations are bound to repeat themselves in time, as it would create a very limited incentive for tenderers to actually engage in meaningful negotiations if the contracting authority can, at any point, dismiss the process and render the transaction costs derived from the negotiations useless.

Moreover, it is hard to see whether this clause actually makes much economic sense, even if interpreted as limiting the options of the contracting authority to the initial decision. If the negotiation game is one in which the contracting authority can (freely) decide to award or negotiate, tenderers may have an incentive to provide their absolute best conditions as the initial offer to try to deactivate the negotiation bit. However, they will only do that if they perceive the contracting authority as a tough negotiator and a well-informed evaluator of the initial tenders. Otherwise, tenderers will have

⁵⁹ A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 28)*, available at <http://pcr2015.uk/regulations/regulation-28-restricted-procedure/>, last accessed 06.04.2017.

⁶⁰ It indicates that: *“Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document.”*

an incentive to offer non-optimal initial tenders in the hope of keeping some surplus during the negotiations (ie they do not need to offer their absolute best, but just a condition that is slightly better than the next most efficient competitor). Hence, it seems obvious that, in view of the informational asymmetry and the difficulties that contracting authorities face when it comes to negotiating,⁶¹ this clause will rarely result in the initial offers reflecting the absolute best available conditions. If this is true (certainly, a difficult empirical question), then it would always be inefficient to award on the basis of the initial tenders, unless the negotiation costs were very high and could offset any loss of efficiency derived from second-best contract terms.

In short, it is difficult to see how the use of this clause can be made economically efficient in the generality of cases, particularly if contracting authorities do not have strong in house negotiation teams or are subjected to (political) constraints that prevent them from developing a credible long-run strong negotiation reputation. And, if its use carries no clear economic advantage, then contracting authorities may be better off ignoring the clause in reg.29(15) PCR2015, as its weak use would open yet another opportunity to challenge award decisions on the basis of excess of discretion or failure to provide reasons where the contracting authority chooses not to negotiate for undisclosed (or inexistent) reasons.

3.3. Contract modifications that can lead to a duty to retender

Reg. 72 PCR2015 transposes the rules on modification of contracts during their term newly established by Article 72 of Directive 2014/24.⁶² The transposition alters the structure of the provision and groups some limitations [reg.72(2) PCR2015] in a way that eliminates repetition and slightly simplifies it. Reg.72 PCR2015 does not transpose the possibility under Art 72(1)(d)(iii) of Directive 2014/24/EU for contracting authorities to assume themselves the main contractor's obligations towards its subcontractors, since this was not included in reg.71 PCR2015. In my view, this does not represent any infringement of the transposition obligations. The only point where the original transposition deviated from the EU rules concerned the possibility to modify contracts under reg.72(1)(b) PCR2015 due to technical or economic issues, particularly concerning interchangeability and interoperability requirements, where the UK rule made the two conditions alternative, whereas Art 72(1)(b) of Directive 2014/24/EU makes them cumulative. This was corrected by the *Public Procurement (Amendments, Repeals and Revocations) Regulations 2016* (see above 2.2). As it stands now, the substantive content of reg.72 PCR2015 is, in my view, in line with Art 72 of Directive 2014/24/EU.

Given the copy-out approach to the transposition, the same uncertainties that derive from the wording of Art 72 of Directive 2014/24/EU are carried over to reg.72 PCR2015 and the UK legislator has made no attempt to develop rules that provide more precise criteria for the modification of contracts during their term. CCS has published guidance on the topic,⁶³ which is worth reproducing here for its simplicity, despite the fact that it does not shed much additional clarity on important aspects such as the concept of 'unforeseen circumstances', the threshold that prevents modifications that render the contracts 'materially different in character', or issues concerning substitution of insolvent contractors, with or without additional changes to the contract as a result of that novation.

⁶¹ P Telles & LRA Butler, "Public Procurement Award Procedures in Directive 2014/24/EU", in Lichère, Caranta & Treumer (n 54) 131-184.

⁶² The full text is available at <http://www.legislation.gov.uk/uksi/2015/102/regulation/72/made>, last accessed 06.04.2017.

⁶³ CCS, *Guidance on Amendments to Contracts During their Term*, October 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560262/Guidance_on_Amendments_to_Contracts_-_Oct_16.pdf, last accessed 06.04.2017.

Any Change

6. A contract/framework may change without re-advertisement in OJEU where:

- The change, irrespective of the monetary value, is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered; or
- The change, irrespective of its value, is not “substantial” as defined in regulation 72(8) [which transposes Art 72(4) Dir 2014/24].

Major Change⁶⁴

7. A contract/framework may change without re-advertisement in OJEU where:

- Additional works, services or supplies “have become necessary” and a change of supplier would not be practicable (for economic, technical or interoperability reasons) and would involve substantial inconvenience/duplication of costs (limited to 50% of original contract price); or
- The need for the change could not have been foreseen by a “diligent” contracting authority, provided these changes do not affect the nature of the contract/framework or exceed 50% of the price of the original contract.

8. In these cases, the contracting authority must publish in OJEU a “Notice of modification of a contract during its term”.

Minor Change⁶⁵

9. A contract/framework may change without re-advertisement in OJEU where:

- It is a minor change that does not affect the nature of the contract/framework; and
- Does not exceed the relevant threshold; and
- Does not exceed 10% (services or supplies) or 15% (works) of the initial value.

Corporate Changes⁶⁶

10. A contract/framework may change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:

- The new supplier meets the original qualitative selection criteria; and
- Other substantial modifications are not made to the contract/framework.

Some of the more interesting parts of the CCS guidance on contract modification concern issues not directly covered by the Directive. In that regard, it is interesting to stress that CCS considers that the rules in reg.72 PCR2015 may apply to call-offs within framework contracts,⁶⁷ and that it is not

⁶⁴ [fn 1] in guidance: “For brevity, this guidance uses “major change” to describe the changes allowed by regulations 72(1)(b), 72(1)(c) and 72(3). Major change is not a defined term.”

⁶⁵ [fn 2] in guidance: “For brevity, this guidance uses “minor change” to describe the changes allowed by regulations 72(5) and 72(6). Minor change is not a defined term.”

⁶⁶ [fn 3] in guidance: “Regulation 72(1)(d).”

⁶⁷ “Regulation 33(6) states that call-off contracts may not depart from the terms of the framework agreement in any substantial respect. This is because amendments to call-off contracts are subject to the terms of the framework agreement used to award them. Where an amendment to a call-off contract is proposed, the terms of the framework agreement should first be considered in the light of regulation 33. If however the framework agreement is silent, and regulation 33 does not prevent the amendment, the rules in regulation 72 should be considered.” *Guidance on Amendments to Contracts* (n 63) 5.

possible to define terms such as ‘materially alter’ or ‘considerably [extend]’.⁶⁸ CCS also considers that bank step-in rights in a PPP/PFI contract meet the review clause condition provided the step-in rights are clear, precise and unequivocal, state the conditions under which they may be used, and do not alter the overall nature of the contract.⁶⁹

4. Options given by the Directive to Member States for Transposition

After the in-depth analysis of some selected issues (above 3), this section now turns to the options exercised by the UK where Directive 2014/24/EU gave Member States some leeway.

4.1. Lack of exercise of optionality

It should not come as a surprise that, given the copy-out technique and the main worry of avoiding gold-plating in the transposition (above 2.1), the UK has decided not to develop optional rules concerning:

- (i) standard terms for how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability referred to in Art 58 of Directive 2014/24/EU [Art 19(2) Dir 2014/24];
- (ii) the use of specific electronic tools, such as of building information electronic modelling tools or similar for public works contracts and design contests [Art 22(4) Dir 2014/24];
- (iii) the possibility of mandating the use of electronic catalogues for specific types of procurement [Art 36(1) Dir 2014/24];
- (iv) mandating the award of contracts in the form of separate lots [Art 46(4) Dir 2014/24];
- (v) restricting or excluding the possibility of examining tenders before verifying the absence of grounds for exclusion and the fulfilment of the selection criteria [Art 56(2) Dir 2014/24];
- (vi) establishing or maintaining either official lists of approved contractors, suppliers or service providers or providing for a certification by certification bodies complying with European certification standards [Art 64(1) Dir 2014/24]; and
- (vii) excluding or restricting the use of price only or cost only as the sole award criterion [Art 67(2) Dir 2014/24].

4.2. Optionality through discretion at contracting authority level

The UK has made use of some of the optionality by deciding to allow discretion to contracting authorities to exercise some of the options left open by Directive 2014/24/EU, such as:

- (i) reserving the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons, or providing for such contracts to be performed in the context of sheltered employment programmes [reg.20(1) PCR2015];
- (ii) specifying the level of security required for the electronic means of communication in the various stages of the specific procurement procedure, and that level shall be proportionate to the risks attached [reg.22(17)(b) PCR2015];

⁶⁸ “It is not possible to define these terms in a way that will apply in all cases. A material alteration or considerable extension in one case will not necessarily apply in other cases. Contracting authorities will need to use their judgment on a case by case basis, taking legal advice as necessary.” *Guidance on Amendments to Contracts* (n 63) 5.

⁶⁹ *Guidance on Amendments to Contracts* (n 63) 7.

- (iii) the possibility for sub-central contracting authorities using restricted procedures to set the time limit for the receipt of tenders by mutual agreement between the contracting authority and all selected candidates [reg.28(7) PCR2015]; and
- (iv) the possibility of limiting the number of lots that may be awarded to one tenderer, where tenders may be submitted for several or all lots [reg.46(4) PCR2015].

Similarly, and following the philosophy of minimal transposition, except where excluding optional rules would put UK businesses at a disadvantage (see above 2.1), the UK decided to transpose the rules on the use of the negotiated procedure without prior publication. In that regard, it is only worth noting that reg.32 PCR2015 alters the order of Art 32 of Directive 2014/24/EU significantly, but it does not expand any of the grounds for the use of the procedure. In a very similar fashion, and given the long-standing tradition of centralised procurement in the UK and the increasing importance of CCS' activities since its creation in 2010,⁷⁰ reg.37 PCR2015 transposes the rules in Art 37 of Directive 2014/24/EU without significant changes. Similarly, reg.39(3) PCR2015 clearly states that contracting authorities shall be free to use centralised purchasing activities offered by central purchasing bodies located in another member State, which avoids imposing any restriction on the type of non-domestic CPB to which contracting authorities can resort [*cf* Art 39(2) *in fine* Dir 2014/24].

4.3. Limited optionality in the monitoring of subcontracting

One area where the exercise of the optionality in the Directive has been used more fully concerns subcontracting, which is developed in reg.71 PCR2015 and transposes Art 71 of Directive 2014/24/EU. Reg.71 PCR2015 brings specific rules on how to deal with subcontracting situations, and it has been complemented with additional guidance issued by CCS.⁷¹ This is an area where the Commission introduced novelties to foster SMEs' (indirect) participation in procurement through streamlined subcontracting opportunities, as well as some rules strengthening the supply/value added chain monitoring possibilities for contracting authorities. This can be observed, for example in recital (105) of Directive 2014/24/EU.

In that regard, and without prejudice to the main contractor's liability vis-a-vis the contracting authority [reg.71(2) PCR2015]; that is, without establishing a direct contractual relationship between the subcontractor(s) and the contracting authority, the latter may ask tenderers to indicate any share of the contract that they may intend to subcontract to third parties and any proposed subcontractors [reg.71(1) PCR2015], and it shall do so where works and/or services are to be provided at a facility under the direct oversight of the contracting authority [reg.71(3) PCR2015]. Any changes in the subcontracting structure for the contract need to be notified to the contracting authority promptly [reg.71(4) PCR2015]. Contracting authorities can extend this obligation to certain contracts not carried out in facilities under the direct oversight of the contracting authority, as well to suppliers involved in works or services contracts, and they can go down the chain beyond the first subcontracting tier [reg.71(7) PCR2015].

By and large the contracting authority is left with the discretion to require information about the sub-contractors (and sub-sub-contractors...) and also to investigate their compliance with the

⁷⁰ For more details see CCS' policies available at <https://www.gov.uk/guidance/public-sector-procurement-policy>. See also the report by the National Audit Office, *Improving government procurement*, 27 February 2013, available at <https://www.nao.org.uk/wp-content/uploads/2013/03/government-proc-full-report.pdf>. Both last accessed 06.04.2017

⁷¹ CCS, *Guidance on the New Subcontracting Provisions*, October 2016, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/560276/Guidance_on_Subcontracting_-_Oct_16.pdf, last accessed 06.04.2017.

requirements of regs.57, 59, 60 and 61. It may decide not to bother with requesting any information from sub-contractors but if it does check for the mandatory exclusion grounds and they are present, the affected sub-contractor must be excluded from the contract. The exception to this discretion is for works contracts and some services contracts [reg.71(3) PCR2015], but not for supplies [reg.71(6) PCR2015]. In these, the contracting authority must require from the main contractor the identity of the sub-contractors and the registry of sub-contractors needs to be kept up to date by the main contractor [reg.71(4) PCR2015]. However, even in these situations, the contracting authority is not under the obligation of checking for grounds for exclusion. This immediately places the contracting authority in a situation where it can monitor and influence the subcontracting activity related to a given contract.

However, the transposition of Art 71 of Directive 2014/24/EU in reg.71 PCR2015 has not maximised the subcontracting management possibilities foreseen in the EU rule. It does not include some of the options in Art 71 of Directive 2014/24/EU, such as the possibility to create mechanisms of direct payment to subcontractors as per Art 71(3) and (7) of Directive 2014/24/EU. However, there are specific rules in other parts of the PCR2015 requiring that 30 day payment terms are flowed down the public sector supply chain,⁷² which may mitigate the effects of such transposition option.

The new rules in reg.71 PCR2015 also try to mitigate the burden of controlling the supply chain that contracting authorities may otherwise face. It is interesting to note that Art 71(1) of Directive 2014/24/EU stresses that “[o]bservance of the obligations referred to in Article 18(2) by subcontractors is ensured through appropriate action by the competent national authorities acting within the scope of their responsibility and remit.” Consequently, the duty for contracting authorities to monitor and ensure compliance with environmental, social and labour law by subcontractors is limited to the general principle of reg.56(2) PCR2015, which refers to the tender itself and seems to restrict the scope of monitoring obligations in a significant way.⁷³ This is without prejudice of their discretion to check that subcontractors are not affected by exclusion grounds [reg.71(8) PCR2015] and seems to fall short from the possibilities foreseen in Art 71 of Directive 2014/24/EU—and, particularly, the lack of transposition of rules imposing joint liability between subcontractors and the main contractor for compliance with environmental, social and labour law (which is, however, not excluded and thus subjected to general contract and tort law principles). In relation to the enforcement of exclusion grounds on subcontractors, reg.71(9) PCR2015 determines that the contracting authority shall require that the economic operator replaces a subcontractor in respect of which the verification has shown that there are compulsory grounds for exclusion; and may require the economic operator to do so where there are non-compulsory grounds for exclusion.

4.4. Optionality resulting in insufficient or defective transposition

In a different group of cases, the transposition does not clarify the extent to which some of the options considered in Directive 2014/24/EU has specific content in the UK or not. For example, despite the wording of reg.21 PCR2015, which does not make reference to other legislation imposing disclosure

⁷² A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 113)*, available at <http://pcr2015.uk/regulations/regulation-113-payment-of-undisputed-invoices-within-30-days-by-contracting-authorities-contracts-and-subcontractors/>, last accessed 06.04.2017.

⁷³ For discussion, see A Sanchez-Graells & P Telles, (2016) *Commentary to the Public Contracts Regulations 2015 (Reg. 56)*, available at <http://pcr2015.uk/regulations/regulation-56-general-principles-in-awarding-contracts-etc/>, last accessed 06.04.2017.

obligations on contracting authorities, there is no doubt that general obligations derived from the *Freedom of Information Act 2000*⁷⁴ apply to most of their activities.

A similar, if not larger difficulty arises from the transposition of Art 50(2) of Directive 2014/24/EU, concerning the possibility for Member States to provide that contracting authorities shall group notices of the results of the procurement procedure for contracts based on the framework agreement on a quarterly basis—in which case contracting authorities shall send the grouped notices within 30 days of the end of each quarter. Reg.50(4) PCR2015 adjusts the requirements for the publication of contract award notices to the working of framework agreements, and determines that contracting authorities shall not be bound to send a notice of the results of the procurement procedure for each contract based on such an agreement. This is meant to simplify the operation of the framework agreement once it is in place. reg.50(4) excuses contracts awarded via framework agreements from being published.

In my opinion, reg.50(4) PCR2015 potentially mistransposes, or at least does not transpose very faithfully, Art 50(2)II of Directive 2014/24/EU. In my view, the interpretation implicit in reg.50(4) PCR2015 is that the entire clause is discretionary for Member States. However, it can also be interpreted that the only space left for Member States in making such a choice is to determine the frequency with which the reporting and publication of the grouped notices needs to be carried out, which is in any case limited to a minimum quarterly periodicity. Imposing no regular reporting and publication obligation on the specific working of the framework agreement whatsoever seems to be in breach of the general principles in reg.18 PCR2015 / Art 18 of Directive 2014/24/EU and, consequently, at least an instance of poor (if not improper) transposition.

To be sure, the choice under reg.50(4) PCR2015 reduces transparency, which can generally be a good thing. However, it does so in a way that deviates from the clear objective of Directive 2014/24/EU, particularly in view of requirements linked to monitoring of procurement of Art 84(2); and it reduces a sort of transparency that is not necessarily of the most damaging for competition, given that it refers to aggregated information that is published with some delay. Hence, there is no good justification for this approach and the PCR2015 incurs in a potential infringement of EU law on this point.

5. Aims given by the Directive to Member States

This section completes the critical assessment of the transposition of Directive 2014/24/EU in the UK by briefly considering the choices it has exercised where the EU rules imposed specific aims on Member States that, due to their general or imprecise nature, were harder to operationalise in specific rules. Once more, given the general approach to the transposition, it should come as no surprise that the PCR2015 take a rather minimalistic approach to the transposition of these requirements.

The most remarkable example is the lack of transposition of Art 18(2) of Directive 2014/24/EU imposing an obligation on Member States to ensure compliance with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

⁷⁴ 2000 c. 36. For in depth analysis, see P Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal*, Law in Context, 4th edn (Cambridge, CUP, 2010). The application of the FOI Act to public procurement was recently assessed in *Sally Ballan v Information Commissioner* EA/2015/0021. See A Sanchez-Graells, “Good Decision on Non-Disclosure of Confidential Information in Public Procurement, despite Use of Freedom of Information Act”, *How to Crack a Nut*, 17 August 2015, <http://www.howtocrackanut.com/blog/2015/08/good-decision-on-non-disclosure-of.html>, last accessed 06.04.2017.

A possible explanation is that the UK Government interpreted that the obligations Art 18(2) imposes are incumbent upon the State itself, which may make them unfit for incorporation into domestic regulations addressed at contracting authorities, because its wording establishes that “*Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with ...*”. If that is the case, there is no evidence of specific legislation which would achieve this aim, perhaps because the UK Government considers its current provisions to be enough. Such an omission does not however create any gap in the transposition of the EU rules, particularly in view of the fact that reg.56(2) establishes the same duty/possibility as Art 56(2) of the Directive.

Exactly the same happens with the obligation in Art 61(1) of Directive 2014/24/EU for Member States to ensure that the information concerning certificates and other forms of documentary evidence introduced in e-Certis established by the Commission is constantly kept up-to-date, which is not transposed in the PCR2015. And the same applies to most of the obligations established by Art 83 of Directive 2014/24/EU, as reg.83 PCR2015 reduces the transposition to Art 83(6) on the obligation to keep copies of concluded contracts above certain thresholds.

In a different approach, some of the general obligations that Directive 2014/24/EU imposes on Member States are simply transposed as a general obligation, which does not seem to create an issue from the perspective of formal compliance with the Directive. This is the case of the obligation to ensure the use of electronic communications of Art 22(1) of Directive 2014/24/EU, which is simply recreated in absolute terms in reg.22(1) PCR2015. Or the simple translation of the obligations related to the duty to take appropriate measures to effectively prevent, identify and remedy conflicts of interest straight to the contracting authorities in reg.24 PCR2015.

A similar strategy is used concerning the obligation to ensure that contracting authorities have the possibility to terminate contracts as per Art 73(1) of Directive 2014/24/EU. Reg.73(1) PCR2015 also pushes this obligation down to contracting authority level. However, anticipating the problems that could exist if contracting authorities failed to explicitly regulate for this situation in their contracts, reg.73(3) PCR2015 creates a ‘saving clause’ whereby “[t]o the extent that a public contract does not contain provisions enabling the contracting authority to terminate the contract ... a power for the contracting authority to do so on giving reasonable notice to the contractor shall be an implied term of that contract”. This is a case of self-protection for the UK Government in relation with the obligation incumbent upon the Member State to ensure the effectiveness of the new rules on contract termination.

The same sound or conservative strategy was not followed concerning the obligation for Member States to put in place *national rules* for the award of contracts for social and other specific services under Art 76(1) of Directive 2014/24/EU. As already discussed (above 2.2), this is an area where, in my opinion, the defective transposition by the UK may imply a breach of EU law.

Barring the last situation, in all other cases, the relevant issue does not seem to be whether the transposition in the UK—or in any other Member State—formally complies with the obligations or general aims established by Directive 2014/24/EU. More importantly, it will be necessary to assess the extent to which Member States substantially comply with those obligations in a way that achieves the goals of the 2014 Public Procurement Package. This is an empirical question to which answers will only emerge as a result of the Commission’s review of the effectiveness of the new public procurement rules—which is bound to take place in April 2019. However, given the delays in transposition in a large number of EU Member States, it is possible that these issues are either not raised in that review, or that they form the object of separate infringement procedures, where appropriate.

6. Conclusion

This chapter has critically assessed the implementation of Directive 2014/24/EU in the UK by the *Public Contracts Regulations 2015*. It has shown how the strict approach to the copy-out principle guiding the transposition of EU law into UK law resulted in a bare bones transposition mainly focused on avoiding gold-plating, rather than on developing a full-fledged regulatory system. In my view, this approach is defective and overlooks the important contextual design of the 2014 EU Public Procurement Package as a set of regulatory instruments aimed at harmonising pre-existing public procurement regimes, rather than attempting to create a full-operational set of rules. Despite the increasing prescriptiveness of the EU public procurement rules, which is not questioned,⁷⁵ I think it is also undoubtable that they do not provide a sufficiently developed system so that contracting authorities can carry out procurement exercises without additional regulatory development. I think it is also clear that the EU public procurement rules must rely on general public law mechanisms at domestic level that, in the case of the UK, are not necessarily sufficiently developed. Overall, in my opinion, this was a missing opportunity to develop a full regulatory architecture for the control of public expenditure by means of procurement in the UK.

⁷⁵ R Caranta, "The changes to the public contract directives and the story they tell about how EU law works" (2015) 52(2) *Common Market Law Review* 391-459; and in relation with the previous generation of EU rules, S Arrowsmith, "The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?" (2006) 35(3) *Public Contract Law Journal* 337-384.